No. 02-1449

Supreme Court, U.S.
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In The

Supreme Court of the United States

IMMACULATE CONCEPTION CORP., and
DON BOSCO HIGH SCHOOL,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's Brief in Opposition claims that the lack of any factual record to support enforcing Chapter 306C.11 of the Code of Iowa in this case is "controlled" by *Metromedia Inc. v. San Diego*, 453 U.S. 490 (1981). Respondent's view is found in *Ackerley Communications v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997). There the Court said:

> "Where a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls,' leaving to the Supreme Court 'the prerogative of overruling its own decisions.'"

Ackerley Communications v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997).

Unlike *Metromedia,* Chapter 306C.11 of the Code of Iowa does not "clearly cabin commercial speech in a distinct category." *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). The Iowa statute bans all visible signs within six-hundred-sixty feet of the right-of-way of any interstate, freeway or primary highway. Then it excepts: (1) all signs in areas that are industrial or commercial; and (2) signs "concerning activities conducted on the property on which [the signs] are located."

Thus Chapter 306C.11 would allow a sign in the front yard of your home on Highway 297 (the highway in this case) if you had a beauty shop in your garage; but it would ban a sign in your yard that said simply "For Peace in the Gulf." *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). It is

submitted this approach achieves a selective and categorical ban that is based on content. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415, 420 (1993).

Petitioners submit that since *Metromedia*, the decisions of this Court have consistently held that the government does have the burden to justify any restrictions on protected speech.

I. The State of Iowa has the burden to show the reality of the asserted harm.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) an attorney practicing in Ohio ran an advertisement that featured a line drawing of a Dalkon Shield. The illustrated ad asked the question "Did you use this IUD?" The attorney received over 200 inquiries and filed over 100 plaintiffs' lawsuits as a result of the ad. Ohio's Disciplinary Counsel filed a complaint against him for violating a Disciplinary Rule which prohibited the use of any illustrations. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 632 (1985). The Grievances Board found that the ad violated the disciplinary rule over the attorney's First Amendment objections. The Ohio Supreme Court adopted the Board's findings and issued a public reprimand. The attorney appealed to this Court, which said:

> "Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions *impose on the State* the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. . . . Because the illustration for which

> appellant was disciplined is an accurate representation of the Dalkon Shield . . . *the burden is on the State* to present a substantial governmental interest justifying the restriction . . . *and to demonstrate* that the restriction vindicates that interest . . ." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641, 647 (1985). (Emphasis added.).

The State argued the use of illustrations in advertising by attorneys creates unacceptable risks that the public will be misled. This Court, however, said:

> "We are not convinced. The State's arguments amount to little more than unsupported assertions: *nowhere does the State cite any evidence or authority of any kind* for its contention that the potential abuses associated with the use of illustrations in attorney's advertising cannot be combated by any means short of a blanket ban. Moreover, *none of the State's arguments establish that there are particular evils* associated with the use of illustrations in attorney's advertisements. . . . *We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task* in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648-649 (1985). (Emphasis added.).

Ten years after *Zauderer* was decided, the state of Florida was required to show that its restriction on targeted direct-mail by attorneys (in the thirty days following an accident or disaster) was aimed at a realistic harm. It did this with a study by the Bar Association. *Florida Bar*

v. Went For It, Inc., 515 U.S. 618, 626 (1995). The majority characterized the study as sufficient to meet the standard elaborated in *Edenfield v. Fane*, 507 U.S. 761 (1993). *Id.* at 628. Fifteen years after *Zauderer*, the United States was required to show that there was a nationwide, pervasive problem of signal bleed to justify a nationwide daytime ban on adult programming. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). The government's study was not sufficient. The opinion concludes:

> ". . . but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive nationwide problem justifying its nationwide daytime speech ban."

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 822-823 (2000).

In all three of these cases, all decided after *Metromedia*, the government, not the citizen, had the burden to show the reality of the asserted harm.

II. The State of Iowa has the burden to show that 306C.11 in fact advances highway traffic safety and environmental esthetics.

The Brief in Opposition claims that requiring the government "to produce studies, statistics or expert testimony regarding the efficacy of the advertising prohibition statute has already been rejected by this Court," again citing *Metromedia Inc. v. San Diego.*

Since the plurality in *Metromedia* found that the way the city ordinance elevated commercial speech over non-commercial speech was fatal, it did not have to reach the problem that the City of San Diego did not produce any evidence showing signs are a hazard to traffic safety. Justice White's opinion says:

> "We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, *e.g.* onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. . . . If the city has concluded that its official interests are not as strong as private interests in commercial communications, may it nevertheless claim that those same official interests outweigh private interests in non-commercial communications? Our answer . . . is in the negative."

Metromedia Inc. v. San Diego, 453 U.S. 490, 520-521 (1981).

Justice Brennan, joined by Justice Blackmun, concurring in the judgment, said:

> ". . . although I have no quarrel with the substantiality of the city's interest in traffic safety, the city has failed to come forward with evidence demonstrating that billboards actually impair traffic safety in San Diego. Indeed, the joint stipulation of facts is completely silent on this issue. Although the plurality hesitates 'to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety,' . . . I would not be so

> quick to accept legal conclusions in other cases as an adequate substitute for evidence *in this case* that banning billboards directly furthers traffic safety."

Metromedia Inc. v. San Diego, 453 U.S. 490, 528 (1981).

At this point in his opinion, Justice Brennan footnoted that the eleven cases cited by the plurality for the proposition that reviewing courts have determined that billboards are a real and substantial hazard applied "the minimal scrutiny rational relationship test *and the presumption of legislative validity*" to hold that it would not be unreasonable for a legislature to conclude that billboards are traffic hazards. *Id.* at note 7. (Emphasis added). Of course, this is overlooked in *Ackerley*. Justice Brennan had a valid point: the eleven cases themselves don't have factual records to support that billboards are a real hazard to traffic.

About ten years after *Zauderer* was decided, the United States was required to show that its restriction on showing the alcohol content on a beer bottle label advanced the government's interest in avoiding "strength wars." The government submitted "anecdotal evidence and educated guesses" which could not overcome that the regulations were irrational. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). The next year Rhode Island was required to show its ban on price advertising significantly reduced alcohol consumption. It failed to carry "its heavy burden." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 516 (1996). Later, the United States failed to connect casino gambling and compulsive gambling with broadcast advertising for casinos – let alone private commercial casinos. *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 189 (1999).

In all three of these cases, all decided after *Metromedia*, the government, not the citizen, had the burden to show the means chosen sufficiently related to the ends served.

III. The State of Iowa has the burden to show that 306C.11 is narrowly tailored and does not unreasonably restrict the public's free speech.

In *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), this Court held that an FCC regulation implementing the Communications Act of 1934 (which prohibited broadcasters in Louisiana from carrying advertising about private casinos) violated the First Amendment under the third and fourth parts of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. 447 U.S. 557 (1979). The Court said:

> "In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. [citations omitted]. The four parts of the *Central Hudson* test are not discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. . . .
>
> "The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – 'a

> fit that is not necessarily perfect, but reasonable; . . . [citations omitted]."

Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173, 183-184, 188 (1999).

The Brief in Opposition claims this showing can be made with common sense and/or legal precedent. (Brief in Opposition, p. 4). Cases from Seattle, Washington, and Lenexa, Kansas are cited. Demonstrating narrow tailoring and reasonable fit by extrapolation of evidence from other cases is unprecedented. *Cf. Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989).

No case from this Court has been cited in the Brief in Opposition in which a majority holds that the government's burden under *Central Hudson* can be shifted to the private citizen whose speech is being restricted. Justices Brennan and Blackmun only concurred in the judgment in *Metromedia*.

IV. Finding that 306C.11 is presumed to be constitutional in a commercial speech case is incompatible with *Central Hudson*.

It cannot be held that the government has the burden to show the harm is real, that the means are effective and that there is a "reasonable fit" while at the same time it is held that the state statute is to be presumed constitutional. This is because a legal presumption puts the burden on the private citizen to produce evidence to the contrary sufficient to satisfy the judge's requirement of some evidence. *See Allison v. Bankers Life Co.*, 230 Iowa 995, 999, 299 N.W. 889 (1941); 9 J. Wigmore, *Evidence*, § 2491 (3rd Ed. 1940). It is submitted that no commercial speech case of this Court has gone so far. The state-law

presumption of constitutionality and the third and fourth part of the *Central Hudson* test are incompatible. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564-565 (1979).

It is submitted that allowing the government to rely on a legal presumption instead of making a factual record fails to satisfy the standard of proof under *Central Hudson*. The Petition for Certiorari should be granted.

Respectfully submitted,

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